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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DOMINQUE DERONE JONES et al., Defendants and Appellants.	B286583 (Los Angeles County Super. Ct. No. TA125699)

APPEALS from a judgment of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Remanded with directions.

Edward Mahler, under appointment by the Court of Appeal, for Defendant and Appellant Dominque Derone Jones.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant James Herbert Lockheart.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant

Attorney General, Steven D. Matthews and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Dominque Derone Jones and James Herbert Lockheart were each convicted following a jury trial of two counts of attempted willful, deliberate and premeditated murder with special findings that the crimes had been committed with a firearm and for the benefit of a criminal street gang. In their prior appeal we affirmed the convictions but remanded the matter for resentencing to permit the trial court to exercise its discretion whether to impose consecutive or concurrent terms of imprisonment for the two offenses. (*People v. Lockheart* (Feb. 15, 2017, B255880) [nonpub. opn.].) On remand the trial court sentenced both Jones and Herbert to consecutive indeterminate state prison terms, aggregating, according to the trial court, 80 years to life.

In this second appeal Jones and Lockheart contend the trial court erred in imposing a state prison term of 15 years to life for attempted willful, deliberate and premediated murder rather than a straight life sentence, as specified in Penal Code section 664, subdivision (a).[1] They request we remand their case for resentencing on the substantive offenses and also to permit the trial court to decide whether to strike or dismiss the firearm-use enhancements imposed pursuant to section 12022.53, subdivision (d), under section 12022.53, subdivision (h), as amended effective January 1, 2018. We agree with their

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[1] Statutory references are to this code.

arguments and remand the matter with directions to the trial court to correct the sentence imposed on the substantive counts and to consider how to exercise its discretion with respect to the firearm-use enhancements.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Initial Appeal and Remand*

Jones and Lockheart were convicted of the attempted willful, deliberate and premeditated murders of Robert Holloway and Marvin Jefferson (§§ 187, subd. (a), 664). The jury also found true allegations Jones and Lockheart personally used and discharged firearms causing great bodily injury in the commission of the crimes (§ 12022.53, subds. (b), (c), (d)) and the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)).[2] The trial court sentenced Jones and Lockheart to consecutive terms of 15 years to life for the attempted murders, with an additional 25 years to life on the firearm-use enhancements, for total terms of 80 years to life in state prison.

On appeal we affirmed the convictions, rejecting Jones and Lockheart's contention the trial court erred in excluding evidence regarding Holloway's ability to identify them as the assailants and finding the evidence was sufficient to support the jury's

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[2] For simplicity this opinion uses the shorthand phrase "for the benefit of a criminal street gang" to refer to crimes that, in the statutory language, are committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b); see *People v. Jones* (2009) 47 Cal.4th 566, 571, fn. 2.)

findings the attempted murder of Jefferson was premeditated and the crimes were committed for the benefit of a criminal street gang. However, we found the record contained strong support for Jones's argument that the trial court misunderstood its sentencing discretion, erroneously believing it was required to impose consecutive sentences for the underlying crimes. Accordingly, we remanded the matter for resentencing as to both Jones and Lockheart.[3]

2. *Sentencing on Remand*

On remand the trial court acknowledged the ambiguity reflected in the transcript of the original sentencing hearing, but stated it understood then, as it did on remand, its discretion with regard to concurrent and consecutive sentencing. Nonetheless, because the matter had been remanded for a new sentencing hearing, the court explained it intended to reconsider whether to exercise that discretion and gave counsel for all parties the opportunity to supplement the record with additional information and to present argument on the appropriate sentence for each defendant.

After considering the additional material presented and argument of counsel, as well as what had been before it at the original sentencing hearing, the court announced, "The sentence

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[3] Although Lockheart did not raise the sentencing issue on appeal, we remanded for the trial court to resentence both Jones and Lockheart under our authority to correct unauthorized sentences at any time. Because the case was remanded for resentencing, we did not address the argument presented by the People that the sentence as imposed was not authorized by section 664, subdivision (a)—the argument Jones and Lockheart advance in the instant appeal.

will be identical as to the original sentencing." The court elaborated, "As to count 1, the 664/187, would be a life term with minimum eligibility of seven years. However, with the jury's finding of premeditation, that is a minimum parole eligibility of 15 years to life. With regards to the 12022.53, subsection (d), that is an additional and consecutive 25 years to life. And with regard to the 186.22—and that's where the error was. The court believes the only error in sentencing was the 186.22 subsection (b) subsection (1) subsection (5) was originally stayed by the court; however, that cannot be stayed but has no effect on the actual sentence since what that does, it mandates a 15 minimum—15-year minimum parole eligibility on the life term, but that is already in place because of the finding of the premeditation as to count 1. With regards to–so the term for count 1 would be 40 years to life. With regard to count 2, it would be identical. . . . And that would be consecutive terms. So the aggregate amount of both is 80 years to life as to each defendant."

The minute order from the November 17, 2017 sentencing hearing on remand records each defendant's sentence as "imprisoned in state prison for a total of 080 years to life . . . 040 years to life imprisonment as to the base count (01) . . . 040 years to life imprisonment as to count (02) forthwith." The abstracts of judgment similarly indicate Jones and Lockheart are to serve consecutive indeterminate terms of 15 years to life on counts 1 and 2, with additional 25-year-to-life terms for the firearm-use enhancements.

DISCUSSION

1. *The Trial Court Erred in Imposing 15-Year-to-Life Terms for Attempted Willful, Deliberate and Premeditated Murder*

Jones and Lockheart correctly assert that the trial court erred in imposing an indeterminate state prison term of 15 years to life for each count of attempted willful, deliberate and premeditated murder, an error the Attorney General had identified in her brief in the initial appeal.[4] As it relates to this offense, section 664, subdivision (a), provides, "[I]f the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole." That section does not provide for a minimum term of imprisonment or a minimum parole eligibility date. (See § 3046, subd. (a) ["An inmate imprisoned under a life sentence shall not be paroled until he or she has served the greater of the following: [¶] (1) A term of at least seven calendar years. [¶] (2) A term as established pursuant to any other law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole."].)

Because the jury found true the special allegations that the offenses had been committed for the benefit of a criminal street gang, however, in lieu of the straight life term otherwise prescribed in section 664, subdivision (a), Jones and Lockheart are subject to section 186.22, subdivision (b)(5), which provides

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[4] Because we were remanding the matter for resentencing, we did not believe it necessary to address the additional sentencing error pointed out by the Attorney General. (See *People v. Lockheart*, *supra*, B255880, at fn. 6.)

that anyone who commits a felony punishable by life imprisonment for the benefit of a criminal street gang "shall not be paroled until a minimum of 15 calendar years have been served."[5] Accordingly, as Jones, Lockheart and the Attorney General basically agree, the proper sentence for the attempted premeditated murder counts is life with the possibility of parole with a minimum of 15 years before parole eligibility.[6]

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[5] Specifically, section 186.22, subdivisions (b)(1) and (b)(5), read together, state, "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: . . . (5) Except as provided in (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served." Section 186.22, subdivision (b)(5), is an "alternate penalty provision" for felonies within its terms, not a "sentence enhancement." (See *People v. Brookfield* (2009) 47 Cal.4th 583, 592-593; *People v. Briceno* (2004) 34 Cal.4th 451, 460, fn. 7.)

[6] The trial court's error with respect to the proper sentence for attempted willful, deliberate and premeditated murder led to its related error in stating section 186.22, subdivision (b)(5), "has no effect on the actual sentence" imposed in this case because, in the court's view, the 15-year minimum parole eligibility date on the life terms was already in place.

Although essentially in accord on this principal point, appellants and the Attorney General disagree on several more nuanced questions: (1) Was specific reference to the 15-year minimum term for parole eligibility properly included by the trial court when imposing Jones's and Lockheart's sentences? The Attorney General says "yes"; Jones and Lockheart, "no." (2) Even if properly included, did the court err when it then summarized the aggregate terms imposed as 80 years to life; and if so, should the related minute orders and abstracts of judgment, which similarly recast the sentence for attempted premeditated murder as "15 years to life," be corrected? Jones and Lockheart answer these questions "yes"; the Attorney General, "no."

As the Attorney General argues, the Supreme Court answered the first question "yes" in *People v. Jefferson* (1999) 21 Cal.4th 86, 101-102, footnote 3, a case, like the current appeal, that addressed the proper sentence for defendants convicted of attempted premeditated murders committed on behalf of a criminal street gang: "By including the minimum term of imprisonment in its sentence, a trial court gives guidance to the Board of Prison Terms regarding the appropriate minimum term to apply, and it informs victims attending the sentencing hearing of the minimum period the defendant will have to serve before become eligible for parole. Thus, when the trial court here pronounced defendants' sentences, it properly included their minimum terms . . . ." (See *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1405 [modifying judgment to strike 10-year gang enhancements "and impose, in their place, 15-year minimum parole eligibility terms"]; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1209 ["as to count 1, the term should have

been life with the possibility of parole with a minimum term of 15 years before parole eligibility"].)

The answers to the additional questions are not so readily apparent. On the one hand, the Legislature has plainly decided to refer to a life sentence with a minimum term in some contexts while denoting in others a life term with a minimum period of confinement before parole eligibility. For example, the punishment for most second degree murders is "imprisonment in the state prison for a term of 15 years to life" (§ 190, subd. (a)); and section 186.22, subdivision (b)(4)(B), provides the alternate punishment for a home invasion robbery committed for the benefit of a criminal street gang is life imprisonment with 15 years as the "minimum term of the indeterminate sentence," in contrast to section 186.22, subdivision (b)(5)'s provision that a person convicted of a felony punishable by imprisonment in state prison for life, if the crime was committed for the benefit of a criminal street gang, "shall not be paroled until a minimum of 15 calendar years have been served." Similarly, section 451.5, defining the elements of aggravated arson, provides the punishment for the offense is "imprisonment in the state prison for 10 years to life" (§ 451.5, subd. (b)), but additionally provides a person sentenced for aggravated arson "shall not be eligible for release on parole until 10 calendar years have elapsed." (§ 451.5, subd. (c); see also § 667.7, subd. (a)(1) [defining a "habitual offender" and providing under certain circumstances the habitual offender "shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 20 years"].) And, as discussed, section 3046, which specifies the default minimum parole eligibility date of seven calendar years (§ 3046, subd. (a)(1)), also states that an inmate serving a life

sentence shall not be paroled until he or she has served "a minimum term or minimum period of confinement under a life sentence before eligibility for parole" as established by any other law (§ 3046, subd. (a)(2)), plainly suggesting the two terms are not identical in their meaning. (See *Roy v. Superior Court* (2011) 198 Cal.App.4th 1337, 1352 [""Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning""]; accord, *Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 565.)

On the other hand, in *People v. Jefferson*, *supra*, 21 Cal.4th 86, while recognizing a difference between an indeterminate sentence that expressly includes a minimum prison term (for example, the punishment for second degree murder, which is ordinarily "a term of 15 years to life") and an indeterminate sentence that does not mention a minimum term (for example, the usual punishment for attempted premeditated murder, which is "imprisonment in the state prison for life"), the Supreme Court held the minimum parole eligibility period in section 3046 is a "minimum term" properly doubled for second strike offenders under the three strikes law. (*Jefferson*, at pp. 96 ["[t]he parole ineligibility set by section 3046 *is* a minimum term within the sentence-doubling language of section 667(e)(1)"], 99 ["section 3046 establishes a minimum term"].) And appellate courts not infrequently describe a life sentence with section 186.22, subdivision (b)(5)'s 15-year parole ineligibility period as "15 years to life," aggregate it with a determinate or indeterminate term enhancement and refer to the overall sentence as consisting of "x years to life." (See, e.g., *People v. Caballero* (2012) 55 Cal.4th

262, 265 [three attempted premeditated murder convictions committed for the benefit of a criminal street gang with related firearm-use enhancements; "[d]efendant's total sentence was 110 years to life"]; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1228-1229 ["the trial court correctly set defendant's penalty at life with a minimum parole eligibility of 15 years. [¶] . . . [T]he trial court added the 25-year-to-life sentence to defendant's sentence of 15 years to life, for a total sentence of 40 years to life"]; see also *People v. Garcia* (2017) 7 Cal.App.5th 941, 948 ["the trial court sentenced defendant to 35 years to life as follows: seven years to life for the attempted murder, plus a consecutive term of 25 years to life for the intentional discharge of a firearm enhancement, plus a consecutive term of three years for the great bodily injury enhancement"].)

Notwithstanding the fairly widespread use of this method of referring to indeterminate life sentences with minimum parole eligibility terms, several courts of appeal, including our colleagues in Division Eight of this court, have held it is error to do so. (*People v. Wong* (2018) 27 Cal.App.5th 972, 977, fn. 4 ["We note the trial court and parties referred to the total sentence as '15 years to life' and to the base term as '7 years to life.' . . . This is common shorthand to refer to a life sentence with minimum parole eligibility. However, the shorthand pronouncement is incorrect because it indicates a minimum term exists, rather than a minimum parole eligibility"]; see *People v. Robinson* (2014) 232 Cal.App.4th 69, 72, fn. 3 ["A term of life with the possibility of parole does not have a minimum determinate term of seven years; rather, a person sentenced to such a term first becomes eligible for parole in seven years"].) And the Attorney General has not always advanced the position he advocates in this appeal.

(See *People v. Robbins* (2018) 19 Cal.App.5th 660, 678 ["Defendant contends his sentence for attempted murder should be life, rather than seven years to life. The People concede defendant is correct"].)

As convenient as this shorthand may be, we agree with Jones and Lockheart it is not only imprecise but also incorrect. The sentence on each of the counts for attempted premeditated murder, committed for the benefit of a criminal street gang, with a true finding that the defendant personally discharged a firearm causing great bodily injury, should be life with the possibility of parole, with a minimum parole eligibility date of 15 calendar years, plus a consecutive indeterminate term of 25 years to life. To the extent the court's oral pronouncement of judgment, the November 17, 2017 minute order and the abstract of judgment reported the sentence on each count as 40 years to life, they must be corrected.

2. *Jones and Lockheart Are Entitled To Have the Trial Court Consider Whether To Strike or Dismiss the Section 12022.53 Firearm-use Enhancements*

The trial court resentenced Jones and Lockheart following remand on November 17, 2017. At that time, pursuant to section 12022.53, subdivision (d), imposition of 25-year-to-life sentence enhancements for attempted premediated murder committed with the discharge of a firearm causing great bodily injury was mandatory.

On January 1, 2018 an amendment to section 12022.53, subdivision (h), became effective, granting the trial court discretion to strike or dismiss an enhancement otherwise required to be imposed by section 12022.53. (See Sen. Bill No. 620 (2017-2018 Reg. Sess.) § 2.) Because Jones's and Lockheart's judgments of conviction are not yet final, the

amendment to section 12022.53, subdivision (h), applies retroactively to them. (See, e.g., *People v. Chavez* (2018) 22 Cal.App.5th 663, 712; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091; see generally *In re Estrada* (1965) 63 Cal.2d 740, 745.) Accordingly, as the Attorney General recognizes, remand is appropriate in this case to allow the trial court to exercise its discretion whether to strike one or more of the firearm-use enhancements imposed.

DISPOSITION

The matter is remanded with directions to the trial court to correct the consecutive sentences imposed on Jones and Lockheart for attempted willful, deliberate and premediated murder, committed for the benefit of a criminal street gang, to provide, as to each count, life with a minimum parole eligibility of 15 years, and to consider whether to strike or dismiss any of the firearm-use enhancements.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.